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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-733

FERINAND GRAVES, ET AL., *Petitioners*,

vs.

JAMES T. LYNN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM

JUDITH WHITTAKER
25th and McGee Trafficway
Kansas City, Missouri 64141

HEYWOOD H. DAVIS
1001 Dwight Building
Kansas City, Missouri 64105
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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The Government's superficial treatment of the facts in this case and authorities cited should not obscure the following:

1. In *Shannon* v. *HUD,* 436 F.2d 809 (3rd Cir. 1970), the appellate court expressly recognized the enjoining of federal financial assistance to a completed illegal project as a remedy to be considered by the district court and specifically ordered such remedy in its remand. The fact that the district court in that case then selected an alter-

native remedy does not affect the principle established by the Third Circuit that such remedy is available and appropriate. The Eighth Circuit below reversed the district court's choice of enjoining federal financial assistance and explicitly eliminated such remedy from further consideration by the district court solely because construction of the project had been substantially completed. (Pet. 15-16.) Thus, the two circuit court decisions are clearly in conflict on that fundamental issue and the resolution of the conflict will establish an important precedent for recurring questions concerning use of federal funds for projects held to be illegal. (Pet. 20-27.)[1]

Respondents' footnote reference (Resp. Memo. 4) to *Ely* v. *Velde,* 497 F.2d 252 (4th Cir. 1974), avoids the significant holding of that case, *i.e.,* that federal funds cannot be used for a project that does not comply with federal law. Furthermore, the order there was made despite reliance of the State of Virginia on the acquiescence of the federal Law Enforcement Assistance Administration in the reallocation of the federal funds to other programs in the state penal system "including substantial expenditures for a jail in Norfolk, Virginia." *Id.* at 255.

2. Contrary to the Government's suggestion (Resp. Memo. 4-5), the purpose of a preliminary injunction is to protect a plaintiff who might be harmed by unlawful action, not to protect a defendant who proceeds with such

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1. The Government's claim that this case is not now appropriate for review (Resp. Memo. 3) is ill-founded. The decision below is final as to the reversal and elimination of the remedy of enjoining federal financial assistance to this project, the remedy which the district court selected from others as the only appropriate one. (Pet. 24-26.) In any event, lack of a final adjudication in the case does not preclude this Court from considering an important question of federal law raised in a U. S. court of appeals. 28 U.S.C. § 1254(1). *E.g., United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1944).

action at his own risk. Petitioners' inability to post an injunction bond in this case should not mean that the Government can proceed in violation of law and thereby foreclose an effective remedy for such violation. Although the defendant developers could construct the project, they could not be assured of federal financial assistance for it in the event such assistance was determined to be contrary to law. The Government and the developers proceeded at their own risk.[2] Petitioners should not be denied the remedy to which they are entitled because they could not afford a bond to prevent the Government's initial undisputed violation of law. The continued violation of that law can and should be enjoined.[3]

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

JUDITH WHITTAKER
25th and McGee Trafficway
Kansas City, Missouri 64141

HEYWOOD H. DAVIS
1001 Dwight Building
Kansas City, Missouri 64105
Attorneys for Petitioners

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2. The developers were not dismissed from the case until March 13, 1972, almost nine months after suit was filed on June 18, 1971, and by that time the project was almost completed. (Pet. 6-8.) Dismissal at the developers' request was appropriate because petitioners could seek and sought no relief from them—only the enjoining of financial assistance by the Government to the project.

3. The Government's expressed anxiety about the consequences to federal housing programs resulting from the threat of financial loss to unsuspecting non-party developers (Resp. Memo. 4-5) is unrelated to the facts in this case. (Pet. 5-7.)